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IN THE

Supreme Court of The United States

OCTOBER TERM, 1965

No. [redacted] 199

GABRIEL DIAZ, RAY BAKER, JOHN FANNON and RONALD VINCENT PECCIA,
Petitioners and Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, No. 20488 of the Criminal Docket of said Court.

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INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	4
Statement of the Case	4
Reasons for Granting the Writ	11
Proof of Service	15
Appendix A . . . Opinion and judgment below	16
Appendix B . . . Order denying rehearing	19
Appendix C . . . Stay of mandate	20

Citations

Alcorta v. Texas (1957) 355 U.S. 28, 2 L. Ed. 2d 9, 78 S.Ct. 103	11
Petrilli v. United States (1942) 129 F. 2d 101	11
Read v. United States (1930) 42 F. 2d 636	12

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Petitioners and Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners Gabriel Diaz, Ray Baker, John Fannon and Ronald Vincent Peccia pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above entitled cause in proceedings No. 20498 of the Criminal Docket of said Court on February 23, 1965 and as to which a rehearing was denied on April 30, 1965. (R. 787, 809) A stay of the mandate of the said Court was granted on May 10, 1965 for a period of thirty days from April 30, 1965 for the purpose of

permitting petitioners to apply herein for a writ of certiorari. (See appendix)

CITATION TO OPINION BELOW

The opinion of the Fifth Circuit Court of Appeals in this case is reported in 341 Federal Reporter, 2d 912. No opinion was rendered in the denial of a rehearing, copy of which order is reproduced in the appendix herein.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was rendered on February 23, 1965, (R. 787, 789) an extension of ten days additional time in which to apply for a rehearing was granted on March 15, 1965 (R. 791) and the application for rehearing was timely filed on March 26, 1965. (R. 792) Rehearing was refused, without rendition of an opinion, on April 30, 1965. (R. 809) Thereafter a stay of mandate, for the purpose of applying for certiorari was issued for a period of thirty days from April 30, 1965. (See appendix)

The jurisdiction of this Court is invoked under Title 28 USC Sec. 1254.

QUESTIONS PRESENTED

1. In a criminal case involving a prosecution for interstate shipment of forged bonds, where a principal issue is the good faith of the defendants in believing the bonds to be genuine, is it a violation of due process for the Government to produce before the jury evi-

dence that one defendant used an alias in dealing with third parties concerning said bonds, where the Government, even prior to trial had full knowledge by reason of its own witnesses and documentary evidence that no such alias had been used at any time?

2. Assuming that it was a violation of due process for the government to have attributed falsely to one defendant the use of an alias, under the circumstances set forth in Question 1, supra, was such error sufficiently prejudicial as to the rights of all defendants, charged as conspirators, to warrant a reversal?

3. In a prosecution of five defendants for interstate transportation of forged bonds, is it reversible error for the trial Judge to grant a judgment of acquittal as to one defendant, charged as a conspirator with the other four defendants, without informing counsel of such proposed action before they make their argument to the jury?

4. In a prosecution for interstate transportation of forged bonds, where the indictment sets forth in separate counts the transportation of two separate sets of forged bonds, is it reversible error for the government to be permitted to offer evidence of dealings in an entirely different set of bonds, involving different parties and different cities, not referred to in the indictment?

5. Assuming that there is no reversible error, per se, in admitting evidence of the transactions relating to bonds and parties not named in the indictment, in the hypothetical question presented in Question Number 4, supra, does the admission of hearsay evidence via

long distance telephone calls relative to death threats in connection with such extraneous bond transactions constitute reversible error?

STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States.

Rule 30 of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

This case involved an appeal by the four remaining defendants from a conviction and sentence under an indictment based upon Title 18, United States Code, Section 2314, relative to the transportation in interstate commerce of certain allegedly forged securities, namely two separate sets of one thousand dollar bearer bonds of Shell Union Oil Corporation maturing April 1, 1971 and carrying interest at the rate of 2-1/2 percent. (R. 1, 2) One other defendant Milton Cohen, a New Orleans attorney, WAS ACQUITTED, receiving a directed verdict of acquittal as to Count One and being acquitted by the Jury as to Count Two.

From the outset of the trial, a principal issue was the bona fides of the various defendants as to a belief that the bonds were genuine. This question was obvious in view of the numerous persons, not indicted, who dealt or attempted to deal in the very bonds involved and the entirely plausible circumstances under which they were offered for sale. One original defendant, Milton Cohen, received a directed verdict of acquittal as to one count and was acquitted by the

jury on the remaining counts and the Court's stated reason for directing an acquittal on one count was the lack of proof as to his guilty knowledge as to the fraudulent nature of the bonds. (R. 744)

BONDS VALID AS TO APPEARANCE AND CIRCUMSTANCES

There is overwhelming evidence in the record to show that the bonds, on their face, were apparently genuine and were of such a quality as to convince experienced persons, including one bank, of their genuineness. Thus one bank in New Orleans, after having a batch of these bonds examined by its expert, accepted the bonds as security for a seven thousand five-hundred dollar loan. (R. 182, 187) No suspicion arose in the minds of the bank officials as to the genuineness of the bonds until after the case broke and the FBI swooped into the bank and seized the bonds as evidence.

An experienced investor in New York, after having the bonds examined by a trusted adviser, issued a check for $65,000 for the purchase of similar bonds, and did not retreat from his contract to purchase same until advised of other facts having no relation to the nature or appearance of the bonds themselves. (R. 663, 664)

Numerous investors and experts in bond deals examined the identical bonds involved here and conducted protracted negotiations for their purchase. (R. 145, 180, 658)

The confusion in the record as to how the bonds got into circulation is simply due to the fact that the Government abandoned its original theory as to the origin of the bonds as set forth in its response to a motion for a bill of particulars. Thus, in its response to an order acquiring certain particulars, the Government had pleaded: (R. 30)

> "The government expects to produce evidence that: (a) The connection which existed between the defendant, John Fannon, and defendants, Diaz and Baker, was *that Baker furnished Fannon a genuine Shell Union bond which was used for the purpose of making the counterfeits described in the Indictment; that Fannon, Diaz and Baker were aiders and abettors, inducers and procurers, and did wilfully cause the illegal transportation charged in the first and second counts and were conspirators as alleged in the third count.*
>
> (b) The defendants Diaz and Baker were aiders, abettors, inducers and procurers, and did wilfully cause the illegal transportation charged in the first and second counts and were conspirators as alleged in the third count." (Emphasis added)

Although the supposed furnishing of a single genuine bond by Baker to Fannon, said to have been used as a sample for the production of allegedly forged securities, was the foundation stone in the government's case, *this major contention disappeared without trace or explanation of any kind.* Instead of showing that "Baker furnished Fannon a genuine Shell Union bond

which was used for the purpose of making the counterfeits . . ." the Government made a mysterious "switch" and *substituted a thoroughly confusing series of innuendos as to where and how the counterfeit process started.*

The Government abandoned its pleaded case (as to the origin of the bonds) and simply set forth a series of transactions *after the bonds had been put into circulation from some undisclosed source.* The initial proof consisted of testimony by one Leo Heyman, not indicted, as to his negotiations with the defendant Milton Cohen, who later received a directed acquittal as to one count and was acquitted by the jury on the remaining counts. In the course of this testimony Heyman related that he became drawn into the bond deal when the defendant Cohen told him over the phone that he had a client who wished to dispose of some bonds belonging to a refugee from Cuba, one Eduoardo Menendez, who was obliged to sell same. (R. 180) Heyman, as a government witness, then testified on direct examination that *when he met Cohen to discuss the bonds the defendant Diaz was represented as being Menendez.* (R. 181, 183) On cross examination however, Heyman *admitted that Diaz had never been introduced to him under any other name than Diaz and that he had never represented himself to any other parties in his presence under a false name.* (R. 226)

Long after the supposed use of the alias by Diaz had been completely exploded by the testimony of the government's own witness, plus other strong circumstantial evidence, the government again injected the false and prejudicial claim as to the use of an alias by Diaz by means of testimony of an FBI agent as to

the substance of *what the defendant Cohen had told him, the FBI agent, as to his relations with Diaz, after the conclusion of the conspiracy.* (R. 687)

In Volume III, page 795, of the printed record filed herewith there appears, in the printed application for rehearing, a detailed discussion of the highly prejudicial impact of the conduct of the Government in persistently putting before the jury false evidence as to the supposed use of an alias by the defendant Diaz. This point, covering some eleven printed pages of the application for rehearing, *is not mentioned in the opinion below.*

For the purposes of this application it is impossible to present, even in outline form, the basis of the other facets of the case, as suggested in the remaining "Questions Presented Above". We can merely state that the Government, having abandoned its pleaded theory of the case, was permitted to bring in evidence of a wholly unrelated conspiracy as to an admittedly different set of bonds, for the expressed purpose of showing guilty knowledge by one defendant. (R. 609 through 677) In the course of presenting this wholly unrelated conspiracy, the Government was permitted to bring in rank hearsay in the form of unidentified long distance telephone calls as to death threats against one of the bond prospects. (R. 623)

Finally, and we merely sketch this error, when the trial Judge had a discussion with trial counsel as to the instructions he would give the jury, he gave no indication whatever as to the fact that he was going to direct an acquittal as to the defendant Cohen on one count. His stated reasons for doing so was the lack of any

guilty knowledge by Cohen at the early stage of the transactions. (R. 744) Since the obvious defense of the other defendants was that they had no more guilty knowledge than Cohen, it was urged that counsel should have been informed of the Court's plan to direct an acquittal as to Cohen, so that this argument could be made to the jury.

The Court of Appeals, in a per curiam opinion, disposed of the twelve specifications of error in one fell swoop in the following words: (See R. 787 and appendix)

"The appellants specify numerous errors, *inconsistencies in the jury verdict, improper jury instructions,* the *refusal of requested instructions,* lack of sufficient proof, *failure of the government properly to respond to a motion for a Bill of Particulars,* incorrect rulings on the admissibility of evidence, the action of the court in directing the acquittal of one defendant, denial of a severance, and undue limitation of cross examination on behalf of the defendants." (Emphasis added)

The emphasized portions of the per curiam above represent gross errors in the Court's summation of what the case was about and what was specified as error. As pointed out in detail in the printed application for rehearing: (R. 793 et sequo)

1. There was no specification of error based on inconsistencies in the jury verdict;

2. There was no specification of error whatever based on either improper jury instructions or refusal of any instructions;

3. There was no specification of error based on a failure of the Government to respond to any motion for Bill of Particulars. On the contrary, appellants contended vigorously that, after responding to a motion for Bill of Particulars and filing the required statement of details as to origin of the bonds, the Government then abandoned its formal pleading and proved up an entirely different case.

Most important, as pointed out in the printed application for rehearing, the opinion failed to state one word relative to the basis upon which Specification of Error Number Two was rejected. Under this specification appellants had urged all of the prejudicial effect of the Government's misconduct in falsely presenting to the jury evidence that the defendant Diaz had used an alias in dealing with third parties relative to the bonds and had represented himself as one Eduoardo Menendez. (See application for rehearing, R. 795 through 807) This error culminated with the introduction in evidence of the statements to the FBI agent by defendant Cohen after the termination of the conspiracy. This final phase of the Government's highly prejudicial misconduct in continuing to parade before the jury false evidence as to the supposed use of an alias by the defendant Diaz, occurred in the latter stages of the case, *long after the Government's own witness, Heyman, had flatly admitted on cross examination that Diaz had never used an alias and that he had always, from the very outset, known him by his right name.* (R. 687)

Thus, this major contention of appellants, remains untouched by the Court of Appeals in its one paragraph, eight line opinion.

REASONS FOR GRANTING THE WRIT

If the Court of Appeals, in disposing of the contention as to the prejudicial effect of the Government's repeated mis-use of the alias testimony, had expressed any rationale for rejecting the appellants' contentions, it would doubtless be possible to present to this Court a conflict between such opinion and those of other Circuit Courts of Appeal, as well as a conflict between such opinion and the holdings of the Supreme Court itself. For it has been held consistently for many years that the suppression of evidence by the prosecution or use of testimony known to be false by the prosecution where such evidence bears upon an important issue, constitutes denial of due process.

In *Petrilli v. United States,* (CCA 8, 1942) 129 F. 2d 101, the Court, while recognizing the prejudicial effect of unwarranted attribution of an alias, found that the prosecution acted in good faith and that the prosecuting attorney was in a position to prove up the 28 alias attributed to the defendant in reading the indictment to the jury.

In *ALCORTA V. TEXAS,* 355 U.S. 28, 2 L. Ed. 2d 9, 78 S. Ct. 103 (1957) this Court set aside a conviction for murder where the State had knowingly relied on perjured testimony. As an annotation to said opinion, there appears an exhaustive collection of cases relative to the fatal effect of deliberate use of perjured testimony in a criminal prosecution. (See 2 L Ed. 2d at page 1575 et sequo).

In Modern Federal Practice Digest, Vol. 10, "Constitutional Law", Key Number 266 (L), page 714, there

are collected numerous cases from all jurisdictions to the effect that suppression of material evidence by the prosecution is a denial of due process, which may constitute reversible error.

On this point the philosophy of all reported cases may be summed up in the words of the Eighth Circuit Court of Appeals in *READ V. UNITED STATES*, 42 F. 2d 636, 645 (1930) where that Court declared:

"It is the duty of a prosecuting attorney to assist in giving a fair trial to a defendant. *The government cannot afford to convict its citizens by unfair means.* (Emphasis added)

The difficulty here is that the Court of Appeals has simply ignored this main contention of all appellants. It is impossible to show any inconsistency between any rule enunciated in this case and the veritable raft of cases from other jurisdictions *because this case enunciates no rule*. No suggestion is made that the error as to the use of the alias testimony was not properly raised or presented. The point as to the alias was squarely raised by Specification of Error Number two and by the repeated objections and motion for mistrial below. No suggestion is made that the misuse of the evidence as to a supposed alias was not prejudicial, and it is inconceivable that any such contention could be made. No explanation whatever is made as to why the grossly prejudicial conduct of the Government as to the false alias testimony is not even considered, one way or the other, by the Court of Appeals.

In the last paragraph of the per curiam the Court makes its closest approach to actually discussing the case in these words:

"A careful examination and analysis of the various questions presented and *skillfully raised by appellants* during a rather extended trial, fails to convince us that prejudicial error was committed." (Emphasis added)

Thus, without more discussion, with kind words for counsel but no reasons for judgment, the appellants are swept up into a vacuum cleaner of ambiguity and their only hope of rescue is the possibility that someone will be curious as to what went into the bag.

The "careful examination and analysis of the various questions presented" has produced no concrete results except a gross distortion of what the appeal involved and the Court of Appeal was squarely confronted with these flat errors in the application for rehearing. (R. 792 et sequo).

The highly prejudicial misconduct of the Government in regard to misuse of the alias testimony is set forth in great detail in an eleven page treatment in our printed application for rehearing, with quotations of testimony and record references. It cannot be repeated in detail here for obvious reasons. (R. 795 through 805)

NATIONAL SIGNIFICANCE

The highly prejudicial error complained of here in regard to the Government's flagrant misuse of the supposed alias testimony here presents an issue which clearly transcends the horizons of this particular case. In these days of an ever increasing power at the Fed-

eral level, there is more need now than ever that the integrity of the judicial process be preserved and that the public know that it is being preserved zealously by our Courts. While these particular appellants are not persons of public status, and their conviction will not cause crowds to picket in protest or editors to editorialize in indignation, what was condoned here by a technique of evasion does indeed present a very real threat to the liberties of many.

For, if a serious charge such as this, a charge that the Government *deliberately and with full knowledge of its falsity* paraded before the jury false evidence as to use of an alias which it well knew to be untrue, can be simply ignored on appeal, then there is no limit to the mischief which can be "swept under the rug" in this fashion. If such conduct can be condoned in silence then, with the tremendous resources of the Federal Government as to investigative manpower and opportunity to manipulate evidence, there is real danger that almost anything can be overlooked and the day of the Police State may well be at hand. As it stands today this case presents a gentlemanly shrugging off of the constitutional rights of these four appellants with an air of "What's the Constitution among friends?" We prefer to believe that this Court, as busy as it doubtless is, endorses the sentiment expressed in the Read case, supra and feels that:

"The government cannot afford to convict its citizens by unfair means."

We respectfully pray that a writ of certiorari be granted, that the judgment of the Fifth Circuit Court

of Appeals be reversed and that the case be remanded for a new trial.

Respectfully submitted,

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and Appellants

PROOF OF SERVICE

I, G. W. Gill, attorney for petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing petition for Writ of Certiorari upon the Solicitor General of the United States and upon the United States Attorney for the Southern District of Florida, by mail, postage prepaid, addressed to their respective offices.

New Orleans, La. May _____, 1965.

G. W. Gill

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20498

GABRIEL DIAZ, RAY BAKER, JOHN FANNON, and RONALD VINCENT PECCIA,
Appellants,
versus
UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(February 23, 1965)

Before WISDOM and GEWIN, Circuit Judges, and BREWSTER, District Judge.

PER CURIAM: The appellants were convicted and sentenced under a three count indictment which charged violations of 18 U.S.C. § 2314 relative to the transportation in interstate commerce of certain allegedly forged securities. Counts One and Two charged interstate transportation of Shell Union Oil Corporation bonds knowing the same to have been counterfeited. Count One charged that 11 of such bonds were

transported from New Orleans, Louisiana to Miami, Florida, and Count Two that 146 were transported from Chicago, Illinois to Miami, Florida. Count Three alleged a conspiracy to commit the acts set forth in Counts One and Two. One defendant was found guilty on all three counts; one on Counts Two and Three; one on Count Three; and one on Counts One and Three. As to another defendant, the court directed a verdict of acquittal under Count One and the jury acquitted him on the remaining two counts.

The appellants specify numerous errors, including inconsistencies in the jury verdict, improper jury instructions, the refusal of requested instructions, lack of sufficient proof, failure of the Government properly to respond to a motion for a Bill of Particulars, incorrect rulings on the admissibility of evidence, the action of the court in directing the acquittal of one defendant, denial of a severance, and undue limitation of cross-examination on behalf of the defendants.

Counsel for the appellants have strongly urged their contentions by brief, oral argument, and supplemental brief. A careful examination and analysis of the various questions presented and skillfully raised by the appellants during a rather extended trial, fails to convince us that prejudicial error was committed.

The judgment is AFFIRMED.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

February 23, 1965

Issued as Mandate:

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20498

GABRIEL DIAZ, RAY BAKER, JOHN FANNON,
and RONALD VINCENT PECCIA,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Florida

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April 30, 1965

ON PETITION FOR REHEARING

Before WISDOM and GEWIN, Circuit Judges, and BREWSTER, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is hereby DENIED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20498

GABRIEL DIAZ, RAY BAKER, JOHN FANNON, and RONALD VINCENT PECCIA,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

ON CONSIDERATION OF THE APPLICATION of the appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of thirty days from April 30, 1965; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from April 30, 1965 there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from April 30, 1965 unless

the above-mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ Walter P. Gewin
United States Circuit Judge.

(ORIGINAL FILED MAY 10, 1965)

Dated:

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 199

GABRIEL DIAZ, RAY BAKER, JOHN FANNON AND RONALD VINCENT PECCIA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 16–17) is reported at 341 F. 2d 912.

JURISDICTION

The judgment of the court of appeals was rendered on February 23, 1965. A petition for rehearing was denied on April 30, 1965. The petition for a writ of certiorari was filed on May 29, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was improper for the government to introduce evidence that a codefendant identified peti-

tioner Diaz by another name in relation to one of the transactions involved in the indictment.

2. Whether it was reversible error for the trial Judge to direct a judgment of acquittal as to one defendant on one count without informing counsel for the others of his intention to do so before they made their summations to the jury.

3. Whether it was error to admit into evidence against petitioners Baker and Fannon, as bearing on their intent, testimony regarding another transaction in which they were involved which was of the same character as that charged in the indictment.

STATEMENT

Petitioners were convicted after a trial by jury of conspiracy to transport in interstate commerce counterfeit Shell Oil bonds. Diaz was also found guilty of two substantive offenses of transporting counterfeit bonds and Baker and Peccia of one such offense (R. 38–40). Diaz and Baker were given concurrent sentences of imprisonment for three years; Peccia was sentenced to imprisonment for one year and a half on one count, and probation on the other; Fannon was sentenced to imprisonment for two-and-a-half years (R. 96–100).

The evidence showed that Cohen, an attorney in New Orleans (who was acquitted), approached one Marder, a Miami public relations man, for help in disposing of Shell Union Oil bonds for a client (R. 146–148). On December 17, 1960, Marder and Cohen flew from New Orleans to Miami with the clients, petitioners Diaz and Peccia (who used the name

"Lay") (R. 148–151). Peccia gave Marder 12 Shell Union Oil bonds in Miami (R. 151–152, 155). Peccia was asked to leave the bonds in escrow, but, after making telephone calls to New Orleans and Chicago, he refused to do so (R. 158–160, 444–445, 462). Marder was allowed to keep the bonds, but he could not arrange a sale and sent the bonds back to Cohen in New Orleans (R. 160–161).

In late December 1960, Cohen told Leo Heymann, a New Orleans attorney, that he had a Cuban client named Menendez who wished to sell a large number of bonds (R. 178–181), but that money would first have to be raised because the bonds had to be picked up in Chicago (R. 180–181). Heymann was subsequently introduced to petitioner Diaz, who was identified as the client (R. 181, 183–184). Heymann was given eleven Shell bonds (R. 181–182, 187, 248–249), shown at the trial to be counterfeit (R. 276–289, 290–296), which he pledged in order to raise money.

On January 6, 1961, Heymann, Cohen and Diaz flew from New Orleans to Chicago. At the airport, Cohen told Heymann to buy the ticket for "Menendez" under the name of G. Diaz (R. 185). Diaz registered in his own name at the motel in Chicago (R. 226, 690).

In Chicago, it took two days for Diaz to obtain the bonds. During this time he made telephone calls to Baker, who was in Kentucky (R. 186–190, 308–312). On January 8, Diaz showed Heymann a laundry sack of the O'Hare Inn containing 146 Shell bonds (R. 193–194). Heymann gave Diaz $2,500 for the bonds, which Heymann was to hold as security until

a sale could be arranged in Florida (R. 195–196). When Diaz left the hotel later that day, he told the desk clerk that he could be reached at Room 320 of the O'Hare Inn (R. 468–471), a room occupied by Baker on January 7 and 8 (R. 414–419).

Heymann and Cohen flew to Miami Beach, Florida (R. 196–197). Diaz was in Miami Beach from January 8 to January 10 (R. 302) and Baker from January 8 to January 11 (R. 325–332). Seventy-five of the bonds were sold to a Mrs. Harris (R. 201, 210, 436–437), who later turned them over to the F.B.I. (R. 439). The other seventy-one were recovered from Heymann (R. 211, 269–270). These 146 bonds were also shown to be counterfeit (R. 276–289, 290–296).

In May 1960, Fannon, using the name John Brown, bought a $2,400 camera, which was repossessed after two months (R. 357–361, 382). A bartender, who shared quarters with Fannon in Chicago, testified that Fannon once showed him some Shell Union Oil bonds (R. 554, 556). The bartender overheard a conversation among Fannon, Peccia, and another concerning a trip by Peccia and Baker from Chicago to New Orleans for the purpose of making "a deal with a Gabriel Diaz" concerning some bonds (R. 500–503). In December 1960, Baker gave some money to a friend with directions to send Peccia to New Orleans (R. 508, 549–550). Subsequently Peccia told the bartender that he had given a few bonds to Diaz, but could not get any money; that he and Diaz had flown to Miami, but that nothing had happened (R. 510–511).

With a *caveat* by government counsel that it bore only on the question of their knowledge and intent (R. 616), evidence was introduced against Baker and Fannon regarding a shipment of counterfeit bonds from Chicago to New York which they had arranged (R. 610–675).

ARGUMENT

1. There is no merit to petitioners' argument that the government improperly introduced evidence that petitioner Diaz had used the name "Menendez." Heymann testified that Cohen had told him that Cohen had a client (whom Heymann later met) named Menendez who wished to sell bonds, and he subseqently testified that he was told to buy the tickets to Chicago in the name of Diaz. The government itself introduced evidence that Diaz used his own name on the flight from New Orleans to Chicago (R. 406), and from Chicago to Miami (R. 405); that he registered in the name of Diaz in Chicago (R. 469); and that he registered under the name of Diaz in Miami in January 1961 (R. 302). There was thus no attempt to insinuate that Diaz had personally used an alias, but the testimony did establish that Cohen had used some name other than Diaz in initially referring to Diaz. Indeed, petitioner Diaz did not object to the admission of the testimony regarding Cohen's identification of the owner of the bonds or seek any limiting instruction since it apparently was part of his defense to assert that Menendez and Diaz were different people, and that Diaz was only acting on behalf of Menendez, who was the real owner of the bonds (R. 227–228).

Petitioners also complain because the government introduced against Cohen, who was a codefendant, statements made by Cohen to the F.B.I. (R. 687–691, 696–700), including his assertions that he had received a call from a Mr. Menendez who said he was a Cuban refugee and wanted to dispose of bonds, and that Menendez used the name Lay when he registered in Miami on the December trip. Cohen also told the F.B.I. that when he travelled with Heymann and petitioner Diaz from New Orleans, Menendez used the name Diaz and registered at the Chicago hotel as Diaz (R. 690). These were statements which Cohen had made, and they were admissible against him. Cohen's mention of the name of Menendez was only an incidental part of the detailed account which Cohen gave concerning his connection with the counterfeit bonds. Moreover, the government offered the statements only against Cohen (R. 685), and the judge instructed the jury that the statements were to be considered only against that defendant (R. 685–686).

2. The court originally denied motions of all defendants for judgments of acquittal. After the closing arguments to the jury, when counsel for Diaz objected to certain remarks which government counsel had made in his summation regarding Cohen, the judge stated that he would dismiss count 1 as to Cohen. He subsequently instructed the jury to bring in a verdict of not guilty on count 1 as to Cohen (R. 744–745, 766–767). It does not appear from the record whether the judge changed his mind after first denying a motion for a judgment of acquittal—which

was clearly a permissible course—or whether he initially intended to dismiss that charge. In any event, there is no reason to believe that counsel for petitioners would have argued differently to the jury had they known that Cohen would be acquitted on count 1. The fact that the judge apparently believed that Cohen did not know the counterfeit character of the bonds does not suggest that petitioners, who were in a different position, were not aware of their counterfeit nature.

3. The testimony admitted against Baker and Fannon with respect to the New York transaction related to dealings during the same period of time and involved the same type of bonds as were involved in the charges on trial. The testimony was properly admitted to show intent and knowledge. *United States* v. *Leitner,* 312 F. 2d 107 (C.A. 2); *Carrullo* v. *United States,* 184 F. 2d 743 (C.A. 8); *Marson* v. *United States,* 203 F. 2d 904 (C.A. 6).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1965

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Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

REPLY BRIEF ON BEHALF OF PETITIONERS

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REPLY BRIEF ON BEHALF OF PETITIONERS

MAY IT PLEASE THE COURT:

In its opposition brief the Government seeks to minimize the impact of its highly improper conduct in falsely attributing to Diaz the use of an alias by stating: (Government Opposition Brief, page 5)

> There was thus no attempt to insinuate *that Diaz had personally used an alias*, but the testimony did establish that Cohen used some name other than Diaz in initially referring to Diaz." (Emphasis added)

The foregoing contention that there was no attempt to suggest that Diaz had personally used an alias is

flatly contradicted numerous times on the face of the record. The government's misuse of this supposed alias testimony commences at page 180 of the record where we find the Government witness Heyman stating that:

> " "Mr. Cohen called me and said *he had a client whose name was Edouardo Menendez*" adding that he had tax problems and was a political refugee from Cuba. (R. 180)

Government witness Heyman then proceeded to identify the supposed Menendez as Diaz. Thus: (R. 181)

> "Q. Did you ever meet this Eduoardo Menendez?
> A. Eventually I met him in Mr. Cohen's office."

Heyman added that this occurred the next day (R. 181)

Three pages later, we find the prosecution continuing to use this counterfeit alias as follows: (R. 183)

> Q. Do you see in the courtroom this Menendez that you say you met?
> A. Yes, sir, I do.
> Q. Would you point him out to the Court and the jury?
> A. He is that gentleman sitting there with the gray hair and it looks like a blue suit," etc. * * *

Mr. Paisley: LET THE RECORD SHOW HE HAS IDENTIFIED THE DEFENDANT, DIAZ"

It is true that the said Government witness, Heyman, on cross examination, retracted the above testimony in which he identified Diaz as having posed as Menendez. Thus: (R. 226)

> "Q. Now, is it not a fact that in Miami where you say you contacted him after you got to Miami, that he was registered at the Sands Motel under the name of Gabriel Diaz or G. Diaz?
> A. That is correct.
> Q. *Then insofar as you know, has he ever used any other name than the name of G. Diaz?*
> A. *No, he hasn't.*"

However, long after Heyman had admitted that Diaz had never posed as Menendez or anyone else, THE GOVERNMENT PERSISTED IN USING EVIDENCE TENDING TO SHOW THAT DIAZ WAS POSING AS MENENDEZ. The above recantation by Heyman occurred at a relatively early phase of the case, at page 226 of the record, quoted above. Long after that, at page 687 of the record, we find the Government still slugging away with the false testimony as to the supposed use of an alias by Diaz. Thus we find FBI Agent Lenihan being used to relate *portions* of a statement by the defendant Cohen in which the alias insinuation is used anew. Lenihan testified: (R. 687)

> "A. We interviewed Mr. Cohen about mid morning on January 13th and he introduced himself as an attorney who had an office in his practice of law in New Orleans, and I told him that as an attorney

> he realized he did not have to make any statements, and any statement he might make could be used in Court, and he said that he realized that. He mentioned that about November or December, 1960, he had received a telephone call at his New Orleans office from a man who said his name was Eduardo Menendez. He subsequently had a couple of personal interviews with Menendez at his office and Menendez related that he was a Cuban refugee who had once been a millionaire but was now an exile in the United States, and he did have some assets that were composed of, among other things, some Shell Union Oil bonds of $1,000 denomination."

Thus, long after the Heyman testimony about the alias had been exploded, as shown above, we have the Government offering more of the same, in the form of an alleged statement by the defendant Cohen, in which he treats Diaz and Menendez as the same person. Lenihan continued to give more of such testimony: (R. 688)

> "Mr. Cohen mentioned that Mr. Menendez gave him $500.00 as expenses in trying to find a source of money to sell them (the bonds) or borrow money on them. And about a week before Christmas, 1960, Mr. Cohen said that he and Mr. Menendez made a trip from New Orleans to Miami where they stayed at the Airport Hotel."

The relation of the above events, such as the furnishing of money and the trip, had been clearly established by several other witnesses. Thus, the insertion of the name Menendez as being the party involved, rather than Diaz, was clearly an attempt by the Government to "sell" the jury the idea that Diaz was using an alias, despite the fact that the initial Government witness on this point, Heyman, had long since retracted his first testimony on that score.

Moreover, in his subsequent testimony in which he continued to relate what the defendant Cohen had told him, FBI Agent Lenihan, quoted Cohen *five additional times as describing Menendez for Diaz.* (R. 689, 690 and 691)

To cap the climax, he threw in for good measure a thoroughly confusing statement attributed to Cohen. Agent Lenihan testified: (R. 690)

> "Cohen mentioned that Menendez registered at the hotel as G. Diaz and also travelled under the name of G. Diaz."

All of the above testimony of FBI Agent Lenihan had been objected to initially by the defense, of course, because it was based on statements made by Cohen to said agent on January 13, 1960, well after the date of the last substantive offense. (R. 685) Moreover, even though January 13 was within the term of the conspiracy pleaded in the indictment, February 1, 1960, the Government had conclusively proven by its own evidence that the whole affair was terminated before January 13, 1960, because on that date the FBI agents were actually picking up the last of the bonds involved

in the case. *Thus, all of the above testimony was erroneously admitted anyway, being made by a co-defendant after the termination of the conspiracy.* The admission of this testimony of Lenihan, relating the statements above attributed to Cohen, were repeatedly objected to and were made the basis of Specification of Error Number Two before the Fifth Circuit Court of Appeals.

The point we focus upon here, however, is that, by continuing to put forward evidence that Diaz had used an alias, long after its principal witness on that point had retracted his testimony, as shown above, the Government was guilty of bad faith.

But the attempt to mislead the jury into the belief that Diaz had used the alias of Menendez did not terminate with the testimony of Agent Lenihan. Still another FBI Agent, Mr. Prospere, was put on the stand, to drag in more prejudicial statements attributed to Cohen regarding the alias. Agent Prospere, referring to what Cohen told him, testified: (R. 698)

> "He stated that he had flown to Miami, Florida, in December 1960 with Lewis Marder *and an individual called Menendez that he later identified from a photograph as Gabriel Diaz" etc.*

Agent Prospere, in his subsequent three pages of testimony, proceeds to use "Menendez" interchangeably with "Diaz" *three times,* in describing what Cohen told him. (R. 698 through 700)

From all of the foregoing it appears clearly ridiculous to suggest, as the Government does in its brief, that there was no attempt to insinuate that Diaz himself used an alias. Nor can the government plead that it was in good faith in putting forth Heyman's initial testimony about the supposed use of an alias. For, long after Heyman had admitted the falsity of his initial testimony as to Diaz having supposedly used an alias, the Government deliberately continued to put forth rank hearsay evidence, to the same effect.

In a case where the principal defense was lack of guilty knowledge as to the actual nature of the bonds, the use of an alias by Diaz would, of course, have been a glaring badge of fraud. Moreover, through his association or contacts with the other defendants, this badge of fraud was one which would obviously been pinned to all of the defendants.

We submit that the principle expressed in the Read case, quoted in our petition for certiorari, is controlling here:

> "The government cannot afford to convict its citizens by unfair means."

The Fifth Circuit, in its opinion below, was completely silent on this point, despite the fact that it was vigorously presented and developed, particularly in the application for rehearing. (R. 795 through 807) In its opposition brief, as we have noted, the Government seeks to evade the impact of its grossly improper conduct by blandly ignoring what the record sets forth in black and white.

At a minimum, therefore, we submit that petitioners are entitled to at least some expression from this Court as to how the conduct of the Government in the trial of this case can be justified.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, G. W. Gill, attorney for petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing "Reply Brief" upon the Solicitor General of the United States and upon the United States Attorney for the Southern District of Florida, by mail, postage prepaid, addressed to their respective offices.

New Orleans, La., September , 1965.

G. WRAY GILL, SR.

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Petitioners and Appellants,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION BY APPELLANTS AND PETITIONERS FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, No. 20498 of the Criminal Docket of Said Court.

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INDEX

	Page
Reasons for granting the writ	2
Certificate of counsel	7
Certificate of service	7

CITATIONS

Ross v. United States, 180 F. 2d 160	3
Steinberg v. United States, 162 F. 2d 120	4
United States v. Crescent-Kelvan Co., 164 F. 2d 582	4
Wright v. United States, 339 F. 2d. 578	5

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PETITION BY APPELLANTS AND PETITIONERS FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, No. 20498 of the Criminal Docket of Said Court.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, Gabriel Diaz, Ray Baker, John Fannon and Ronald Vincent Peccia, pray that this Court grant a rehearing of its order of October 12, 1965 denying the petition for a writ of certiorari to the Court of Appeals for the Fifth Circuit in the above entitled case as prayed for in the petition for certiorari filed herein on May 1, 1965.

REASONS FOR GRANTING THE REHEARING AND ISSUING THE WRIT

In our original application for certiorari the sole grounds urged for issuance of the writ was the prejudicial effect of supposed use of an alias by the defendant Diaz. We now urge, as basis for a rehearing of the denial of the petition, a point which was merely mentioned, in passing, but in no sense presented or developed in said petition, namely, the failure of the Court to inform counsel, before they made their arguments to the jury, that the Court intended to direct an acquittal as to one defendant, Cohen.

This error was fully preserved below and made the subject of Assignment of Error No. Three in our brief to the Court of Appeals. (Appellants Original brief, p. 53 et sequo) This point has been unmentioned by the Court of Appeals in its per curiam opinion. It is, we submit, a point of sufficient national interest to warrant consideration by this Court, particularly as there appears to be no case squarely on this point at the Supreme Court level and only a few decisions at the appellate level which even approach the problem.

As noted at length in our statement of the case on petition for certiorari, this case involved a prosecution for interstate shipment of forged bonds. The bonds were so genuine in appearance that they were calculated to be acceptable to almost any purchaser, one batch thereof being accepted by a bank as security for a loan and others being accepted by experienced investors after having them checked by experts.

The principal defense, therefore, was that these de-

fendants, appellants and petitioners herein, or at least some of them, may well have been acting in good faith in their varied connections with these bonds, like many other citizens, named in the evidence or testifying in Court, but unindicted.

The first intimation that the Court felt inclined to accept the idea that any defendant had acted in good faith occurred *after all argument to the jury had been concluded.* This occurred when counsel for Diaz, Mr. Gill, objected to remarks made during argument to the jury by the prosecution, referring specifically to language used by the prosecution "that Cohen knew from the first trip here that these bonds were counterfeit." (R. 737). Whereupon, the Court, for the first time declared: (R. 737)

THE COURT:
I AM GOING TO DISMISS NO. 1 AGAINST MR. COHEN ANYWAY.

Thereafter counsel for Diaz, Mr. Gill, specifically objected to the direction of a verdict of acquittal as to Cohen on the first count and *moved for a mistrial.* (R. 768)

In *ROSS V. UNITED STATES,* 180 F. 2d. 160, Sixth Cir. 1950, the Court, in discussing the obligations of the trial judge under Rule 30 to inform counsel of disposition of requests prior to their arguments to the jury, stated: (Page 165, col. 2)

"The obvious object of the rule in point is to require the judge to inform the trial lawyers in a fair way what the charge is going to be, SO THAT THEY MAY

INTELLIGENTLY ARGUE THE CASE TO THE JURY. (Emphasis added.)

In *UNITED STATES V. CRESCENT-KELVAN CO.*, 164 F. 2d 582, Third Circuit, 1948, the Court emphasized the importance of following Rule 30 as to notifying counsel of the intended disposition of requests as to charges *prior to argument*, and the reversal of convictions here seems predicated equally upon failure to observe this requirement as upon the failure to separate the counts of the indictment as to each defendant.

In *STEINBERG V. UNITED STATES*, 162 F. 2d 120, Fifth Circuit, 1947, the point was presented that the trial judge did not inform counsel of his proposed disposition of special charges, but in holding the error harmless, this Court, with Judge Sibley as organ declared: (Page 125, col. 2)

"The substance of most of the requests indeed appear in the charge. Some ought not to have been given. No argument is made as to error in refusing any, though a general specification of error was made in taking the appeal. NONE OF THEM SEEMS TO US TO BE OF A SORT THAT WOULD HAVE AFFECTED THE ARGUMENT IF IT HAD BEEN KNOWN THAT IT WOULD NOT BE GIVEN." (Emphasis added)

In the case at bar, exactly the reverse is true. Here, clearly a main defense of all defendants was that the bonds were of so genuine in appearance and the terms upon which they were being offered were unsuspicious, that merely trying to work up a deal on the bonds could not be taken as a badge of fraud. THIS WAS

OBVIOUSLY THE BASIS UPON WHICH THE COURT ORDERED AN ACQUITTAL AS TO COHEN ON COUNT ONE.

We submit that, ordinary, common sense fair play demanded that if the Court was going to let Cohen out on the basis that merely handling a deal with the bonds was insufficient to render him guilty, then the other defendants, *particularly Diaz and Peccia, were entitled to make the same argument as to their lack of guilty knowledge, merely by reason of their having handled the bonds.* We say that this is true particularly of Diaz because, as noted above, he was "low man on the Totem pole" as regards the time order of becoming connected with these bonds. He came into the picture just before Cohen.

WHAT MORE IMPORTANT ISSUE COULD THERE BE, FOR PURPOSES OF ARGUMENT, THAN THAT THE COURT ITSELF, BY DIRECTING A VERDICT OF ACQUITTAL AS TO ONE DEFENDANT, *WAS ACCEPTING A STANDARD OF COMPARISON AS TO LACK OF GUILTY KNOWLEDGE?*

Such a development was of the first magnitude, far surpassing the importance of any slight technical definitions which the Court might or might not see fit to give the jury.

In WRIGHT V. UNITED STATES, 339 F. 2d. 578 (Ninth Circuit, 1964) the Court found no difficulty in holding that failure of the trial Judge to inform counsel for the defendant as to what disposal he would make of certain specially requested charges was highly prejudicial and reversed the conviction. Referring

to Rule 30 of the Federal Rules of Criminal Procedure, the Court, quoted earlier cases, all to the effect that the purpose of Rule 30 is to permit trial lawyers to "intelligently argue the case to the jury".

We respectfully submit that, in the instant case the failure to inform counsel of the Court's intention to order an acquittal as to one defendant until after all argument had been concluded, was much more prejudicial to these defendants than what was held reversible error in Wright, supra.

In conclusion, we urge most earnestly that this Court grant a rehearing of its order denying certiorari, in order that the above point, and others previously presented of national interest, may be considered.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

Counsel for Petitioners

CERTIFICATE OF SERVICE

I, G. Wray Gill, Sr. do hereby certify that I am of counsel for all petitioners in the foregoing application for rehearing and that I am a member of the Bar of the Supreme Court of the United States. I further certify that copies of the foregoing petition for rehearing have been served upon the Solicitor General of the United States and upon the United States Attorney for the Southern District of Florida at their respective offices by mail, postage prepaid, by posting same on the ____ day of November, 1965.

G. Wray Gill, Sr.